No. 92-484

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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UNITED STATES NATIONAL BANK OF OREGON,
*Petitioner*

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

In this case, the court of appeals held that Section 92 of the National Bank Act, which authorizes national banks "located and doing business" in places of 5,000 or fewer inhabitants to act as the agent for "any fire, life or other insurance company," no longer remains in force. Pet. App. 17a. In our petition, we demonstrated that the court of appeals has ignored statutory language and overlooked pertinent aspects of the legislative record. As a result, the court's erroneous interpretation calls into question widespread and substantial national and state bank insurance activities that Section 92 has engendered over the past seventy-five years. Moreover, we pointed out that the court of appeals' decision conflicts squarely with the Second Circuit's decision in *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (1992), *petitions for cert.*

*pending* (Nos. 92-482 & 92-645).[1] Finally, we showed that the court of appeals reached out to nullify Section 92 by creating a controversy of its own making.

In response, respondents seek to minimize the importance of the substantial issues presented, the waywardness of the court of appeals' decision, and the sharpness of the conflict among the circuits. Respondents' efforts fall far short of the mark.

1. Respondents contend (Br. in Opp. 8) that there is "no meaningful conflict" between the decision below and the Second Circuit's decision in *American Land Title Ass'n v. Clarke*, because the continued existence of Section 92 was not a necessary component of the Second Circuit's decision. *See* Br. in Opp. 8-10. As the Second Circuit stated at the outset, "[t]he issue in this appeal is whether two provisions of the National Bank Act, 12 U.S.C. §§ 92 and 24 (Seventh) (1988), permit national banks to engage in the title insurance agency business." *American Land Title Ass'n v. Clarke*, 968 F.2d at 150-51. In resolving that issue, the court of appeals first held, "[c]ontrary to the view of the D.C. Circuit," that the omission of Section 92 from the 1918 War Finance Corporation Act was "inadvertent" and did not "effect[] a repeal of section 92." 968 F.2d at 152. Th court then proceeded to hold that Section 92 impliedly prohibits "national banks located and doing business in towns with *over* 5,000 inhabitants from engaging in the insurance agency business," including the sale of title insurance. 968 F.2d at 156 (emphasis in original). Because the court concluded that Section 92 was a limitation on national bank authority, it saw "no need to determine the scope of section 24 (Seventh)," the provision authorizing national banks to engage in activities "incidental" to the "business of banking." 968 F.2d at 157.

[1] The Solicitor General, on behalf of the Acting Comptroller of the Currency, has also sought review of the decision below and has echoed these points. *See* U.S. Pet., No. 92-507, at 8-21.



By its terms, the Second Circuit's decision conflicts squarely with the decision below regarding the existence of Section 92—a fact recognized by the Solicitor General and others.[2] Contrary to respondents' assertion, the Second Circuit's judgment that Chase Manhattan may not sell title insurance was grounded in its holding that Section 92 exists as a limitation on national bank activities.[3] The conflict between the Second Circuit's decision and the decision below is therefore manifest.

Respondents seek to wish away that evident conflict by suggesting that "there was no necessity for the Second Circuit to decide whether Section 92 had been repealed" because "[Section 92's] enactment in 1916 demonstrates that national banks do not possess any power to sell insurance." Br. in Opp. 10. Apart from the dubious merit of such an argument, *see, e.g.*, U.S. Pet., No. 92-645, at 9-18, that argument fails to come to grips with the Second Circuit's judgment.[4] Respondents' effort at revi-

[2] *See* U.S. Pet., No. 92-507, at 8-10; American Bankers Association Br. 4-5; Kentucky Bankers Association Br. 6, 8; American Bankers Association Br., No. 92-507, at 4-5; Kentucky Bankers Association Br., No. 92-507, at 6, 8; *see also* U.S. Pet., No. 92-645, at 9; Chase Br. in Opp., Nos. 92-482 & 92-645, at 9-10; American Bankers Association Br., No. 92-482, at 3-4; American Bankers Association Br., No. 92-645, at 3-4.

[3] *See Black v. Cutter Lab.*, 351 U.S. 292, 297-98 (1956) ("This Court . . . reviews judgments, not statements in opinions."). For that reason, and contrary to respondents' suggestion (Br. in Opp. 11), it is immaterial that petitioner and the Solicitor General each take issue with one aspect of the statutory analysis embraced by both the decision below and the Second Circuit, namely, that Congress enacted Section 92 as part of Section 5202 of the Revised Statutes.

[4] Respondents thus err in suggesting (Br. in Opp. 10) that the Second Circuit's judgment would not be altered if, contrary to our contention, Section 92 has been repealed. *See* U.S. Pet., No. 92-645, at 19 n.2.

Respondents also err by asserting (Br. in Opp. 22 n.29) that the decision below may be affirmed on the alternative ground that the

sionism cannot obscure the square conflict over the existence of Section 92 that warrants this Court's review.

2. Respondents also contend (Br. in Opp. 18-21) that there is no need to determine whether Section 92 remains in force because that issue is of limited practical importance. First, respondents conveniently ignore the fact that, as matters now stand, the substantial national and state bank insurance activities engendered by Section 92 are called into question.[5] Respondents assert that "relatively few national banks *could* actually be affected by the court's decision," by suggesting that "[n]o one has offered a firm number of the national banks selling general insurance pursuant to Section 92." Br. in Opp. 19. The fact that the number of banks engaged in insurance activities comprises a relatively small percentage of the total number of national and state banks does not diminish the significance of these activities. The insurance activities at stake—as evidenced by the vigorous opposition of insurance trade associations in this case and elsewhere—are substantial.

Second, respondents argue (Br. in Opp. 19-20) that the issue presented is insubstantial because a parallel provision of the Bank Holding Company Act ("BHCA"), 12 U.S.C. § 1843(c)(8)(C)(i), permits bank holding companies to sell insurance through subsidiaries in towns with 5,000 or fewer inhabitants. That statutory author-

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Comptroller's initial decision in this case was erroneous. The court of appeals had no occasion to address that question, and this Court does not ordinarily consider questions not specifically passed upon by the court below. *See, e.g., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982).

[5] *See* Pet. 10 & n.13; American Bankers Association Br. 1-4; Kentucky Bankers Association Br. 9; American Bankers Association Br., No. 92-507, at 1-4; Kentucky Bankers Association Br., No. 92-507, at 9; *see also* U.S. Pet., No. 92-507, at 19 n.11 ("Whatever the exact figure, it is clear that a significant number of national banks currently engage in activities authorized by Section 92.").



ity is no substitute for Section 92. As respondents acknowledge in passing, "[t]he BHCA permits the sale of insurance only to customers located in [a] small town and its environs," whereas Section 92—as long construed by the Comptroller—does not contain a geographical limitation on customers. Br. in Opp. 20 n.26. In any event, a bank would not have to form a bank holding company if Section 92 remained good law.[6]

Third, respondents neglect to mention the fact that the insurance industry and private litigants are currently wielding the D.C. Circuit's holding that Section 92 has been repealed as a sword against the Comptroller's approval—and ongoing regulation—of national bank insurance activities.[7]

Finally, the issue of Section 92's existence is not a parochial concern only for bank regulators. As has been previously pointed out, that issue affects legal matters that extend beyond the limited question of whether certain national banks may sell insurance.[8] Thus, respondents' statement that other courts—including this Court—over the years have "simply 'assumed'" Section 92's existence is beside the point. Br. in Opp. 17.[9]

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[6] Respondents suggest that, even apart from the BHCA, banks may have "some prospect of alternative federal sources of insurance-agency authority," citing interpretive rulings issued by the Comptroller. Br. in Opp. 20 n.27. In view of the litigation pending before the Court in *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (1992), *petitions for cert. pending* (Nos. 92-482 & 92-645), and respondents' submission attacking the Comptroller's ruling at issue there, *see* Independent Insurance Agents of America, Inc. Br., Nos. 92-482 & 92-485, at 12-19, respondents' suggestion rings hollow.

[7] *See, e.g.*, American Bankers Association Br. 8 & n.2; Kentucky Bankers Association Br. 12-13.

[8] *See* U.S. Pet., No. 92-507, at 20-21; Pet. 9 & n.11.

[9] In view of the square conflict and the significance of the issue presented, respondents err in suggesting (Br. in Opp. 12 n.11) that further review is not warranted because that issue is currently

3. Turning to the merits of the court of appeals' decision, respondents contend that "the text [of the 1916 Act] will not bear the strained reading Petitioners would force upon it." Br. in Opp. 13. At the outset, it bears emphasis that respondents—like the court below—offer no plausible basis for assuming that Congress, by enacting the War Finance Corporation Act in 1918, had any intention of repealing the national bank insurance authority it had adopted two years before. *See American Land Title Ass'n v. Clarke*, 968 F.2d at 151-54. Moreover, a close look at the 1916 enactment refutes respondents' position.

The paragraph of the 1916 enactment immediately preceding the reference to Section 5202 (that concerning Federal reserve bank advances to member banks (paragraph 6)), and the paragraph of the 1916 enactment immediately preceding the reference to the Section 92 provision (that concerning Federal reserve bank rediscounts of bills and acceptances (paragraph 8)), each expressly refers to "this Act," *i.e.*, the Federal Reserve Act. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753; Pet. App. 69a-70a.

By contrast, the Section 5202 reference in the 1916 enactment (paragraph 7)—which appears before the paragraph containing what became Section 92 (paragraph 9)—concludes with a cross-reference to "the Federal reserve Act." This specific reference thereby demonstrates that the paragraph identified as "Fifth" marks the end of the Section 5202 reference. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753; Pet. App. 70a.

Respondents argue that the reference to "this Act" in the paragraphs preceding the references to Section 5202

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pending before the Sixth Circuit. *See Owensboro Nat'l Bank v. Moore*, No. 91-3 (E.D. Ky. Aug. 4, 1992), *appeals pending*, Nos. 92-6330 & 92-6331 (6th Cir.). Such pending litigation calls for this Court to step in now to resolve the uncertainty.



and Section 92 in the 1916 enactment "could serve simply as an antecedent reference" to the Federal Reserve Act. Br. in Opp. 14. That argument ignores the components of the 1916 enactment, namely, the precise language of the 1913 Act which had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 80a. That amendment to Section 5202 of the Revised Statutes, by necessity, referred to the "Federal Reserve Act." Pet. App. 80a. By contrast, the concluding paragraph of the 1913 Act, which concerned Federal reserve bank rediscounts of bills and acceptances, referred expressly to "this Act," namely, the Federal Reserve Act. *See* Pet. App. 80a. That concluding paragraph, which was obviously part of the Federal Reserve Act, appears in the 1916 enactment immediately preceeding the reference to Section 92. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752; Pet. App. 70 (paragraph 8). Respondents' "antecedent reference" theory therefore breaks down. The reference to "this Act" in the rediscount provision (paragraph 8)—a part of the Federal Reserve Act—confirms that the Section 5202 reference had ended.[10]

Respondents also assert that "the phrase 'this Act' in the paragraph preceding Section 92 may refer to nothing other than the 1916 Act itself." Br. in Opp. 14. That argument fails because the reference to "this Act" in the 1916 enactment appears verbatim in Section 13 of the Federal Reserve Act of 1913. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 80a. In other words, Congress was plainly referring to the original Federal Reserve Act—not the 1916 enactment itself.

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[10] For that reason as well, respondents doubly err in asserting that "the structure of the 1916 Act—which Petitioners ignore—furth resupports the conclusion that Congress made Section 92 part of R.S. 5202." Br. in Opp. 15.

Respondents contend that the construction outlined above "does violence to express statutory language" because it requires the Court to ignore the prefatory language that Section 5202 " 'is hereby amended [so] as to read as follows." Br. in Opp. 15; *see* Pet. App. 70a. That prefactory language appears in Section 13 of the 1913 Act, where Congress had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 79a-80a. In order to amend Section 13 in 1916, Congress restated that provision of the Federal Reserve Act in its entirety. In so doing, the 1916 Act restated verbatim a portion of the 1913 Act that referred to amending Section 5202, but the 1916 Act did not change the 1913 amendment. *See* Pet. App. 70a, 79a-80a. Respondents' argument simply has basis other than the placement of the quotation marks. In view of the drafting history surrounding that inadvertently placed punctuation, *see* Pet. 14-16, which respondents ignore, and in light of Congress's actions described above, that argument is makeweight.

In sum, it is apparent that this is not a case where "the deletion of Section 92 was a 'mistake,' " whose remedy lies with Congress. Br. in Opp. 22. To the contrary, the D.C. Circuit has erroneously construed a federal statute out of existence—a substantial legal issue that plainly calls for this Court's review.[11]

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[11] Respondents take issue (Br. in Opp. 16 n.17) with our statement that the Federal Reserve Board, in its compilation of pertinent banking statutes submitted to Congress in 1917, set forth Section 92 as part of the Federal Reserve Act. *See Third Annual Report of the Federal Reserve Board* 135-36 (1917); Pet. 16 & n.22. Respondents ignore the fact that, in that compilation, the statute appears with quotation marks only introducing each paragraph, thus showing that Section 92 is part of the Federal Reserve Act. Contrary to respondents' submission, the *Annual Report* did not show the 1916 Act with "quotation marks . . . as it appears in the Statutes at Large," Br. in Opp. 16 n.17, *i.e.*, with quotation marks closing the paragraph before the Section 5202 reference and quotation marks introducing the first paragraph of the Section 5202 reference.



4. Respondents contend (Br. in Opp. 22-24) that the D.C. Circuit's determination whether Section 92 remained in force, where the parties neither presented nor took adverse positions on that issue, is unexceptionable. Respondents neglect to mention a critical point—until ordered to respond to petitions for rehearing filed by the Comptroller and petitioner, respondents expressly adhered to the position that Section 92 remained good law. *See* Pet. 6 n.7, 7 n.9. In other words, as this Court has admonished, federal courts "do not sit . . . to give advisory opinions about issues as to which there are not adverse parties before [the courts]." *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (*per curiam*). Respondents' effort to distinguish *Williams v. Zbaraz*, 448 U.S. 358 (1980), is unavailing, because there, as here, the statute at issue was not "in controversy." Br. in Opp. 23 n.31.

For those reasons as well, respondents err (Br. in Opp. 23 n.30) in asserting that the court of appeals' decision may be excused under the principle that courts need not accept "stipulations as to questions of law." *Estate of Sanford v. Commissioner*, 308 U.S. 39, 51 (1939). The parties here did not reach any stipulation, and the fact that the parties each took the position that Section 92 remained good law is not tantamount to putting that "question of law" in controversy.

Finally, respondents argue that this Court should not use its "scare resources" to review this "predicate issue." Br. in Opp. 24. The issue regarding the propriety of addressing matters *sua sponte* on appeal, although often case-specific, has confused the lower courts. *Compare Warren v. City of Lincoln*, 864 F.2d 1436, 1439 (8th Cir.) (issues generally subject to review), *cert. denied*, 490 U.S. 1091 (1989); *Kirby v. Allegheny Beverage*

*Corp.*, 811 F.2d 253, 256 n.2 (4th Cir. 1987) (same) *with Mitchell v. Keith*, 752 F.2d 385, 391 n.3 (9th Cir.) (issues not subject to review absent plain error), *cert. denied*, 472 U.S. 1028 (1985); *Cohen v. Franchard Corp.*, 478 F.2d 115, 124 (2d Cir.) (same), *cert. denied*, 414 U.S. 857 (1973). This case therefore presents an opportunity for the Court to address this "predicate," yet substantial, issue confronting federal courts.

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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